

Tab D

Tab D-1

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MASSACHUSETTS

3
4 IN RE:) MDL No. 1456

5 PHARMACEUTICAL INDUSTRY)

6 AVERAGE WHOLESALE PRICE) Civil Action:

7 LITIGATION.) 01-CV-12257-PBS

8
9
10 The deposition of TERRY D. TENBRUNSEL called

11 by the Plaintiffs for examination, pursuant to the

12 Rules of Civil Procedure for the United States

13 District Courts pertaining to the taking of

14 depositions, taken before Mary C. Kelly, a

15 Certified Shorthand Reporter and Notary Public

16 within and for the County of Cook and State of

17 Illinois, at Suite 5500, 10 South Dearborn Street,

18 Chicago, Illinois, commencing on the 10th day of

19 November, A.D., 2005, at 9:00 o'clock a.m.

20

21

22

1 PRESENT:

2 THE WEXLER FIRM LLP,
3 (One North LaSalle Street, Suite 2000,
4 Chicago, Illinois 60602), by:

5 MS. JENNIFER FOUNTAIN CONNOLLY,

6 On behalf of the Plaintiffs;

7
8 SIDLEY, AUSTIN, BROWN & WOOD,
9 (10 S. Dearborn Street,

10 Chicago, Illinois 60603), by:

11 MR. RICHARD RASKIN,

12 On behalf of the Deponent.
13
14
15
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22

1 I think I would need to get back to you on that.

2 Q. Okay.

3 And then DTIC Dome and Mithracin are not
4 actively marketed at this time?

5 A. To the best of my knowledge, there is
6 not and has never been a product manager or a
7 sales force assigned to either of those two
8 products to the best of my knowledge.

9 Q. And is that how you define actively
10 marketed as whether a product has a product
11 manager for it?

12 A. I would define actively marketed as a
13 combination of two things, a product manager
14 working on it and a sales force being deployed
15 against it.

16 Q. Okay.

17 And you said DTIC Dome did not have a
18 product manager. Did it ever have a sales force
19 to your knowledge?

20 A. Not to my knowledge as far back as 1985.

21 Q. Is the same thing true for Mithracin?

22 It neither had a product manager or a sales force?

1 A. Both DTIC Dome and Mithracin to the best
2 of my knowledge have never had either deployed
3 against it.

4 Q. I apologize for butchering the names.

5 A. That's all right. It's not a problem
6 for me.

7 Q. So when there is a product -- let's
8 start with the pharmaceutical side -- that doesn't
9 have a product manager or a sales force deployed
10 to it, where are sales -- even if they are small,
11 where are they channeled? To what group?

12 A. I don't know that I can speak to the
13 pharmaceutical side, Number 1, and, Number 2, I'm
14 not sure that I understand your question.

15 Q. I guess I was inquiring if a customer
16 had a question about one of those products or
17 wanted to ask someone about them, who would they
18 contact at Bayer if there were no active field
19 sales force in place or product manager in place?

20 A. What kind of question are you thinking
21 about that might be raised?

22 Q. Well, let's start with a question just

Tab D-2

1 THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF MASSACHUSETTS

3 ---000---

4 -----X

5 In Re: PHARMACEUTICAL) MDL DOCKET NO.

6 INDUSTRY AVERAGE WHOLESALE) CIVIL ACTION

7 PRICE LITIGATION) 01CV12257-PBS

8 -----X

9 THIS DOCUMENT RELATES TO:)

10 ALL ACTIONS)

11 -----X

12 HIGHLY CONFIDENTIAL

13 VIDEOTAPE 30(b)(6) DEPOSITION OF

14 JEFF BUSKA, VOLUME III

15
16 Taken at 33 South Last Chance Gulch

17 Helena, Montana

18 Friday, December 15, 2006 - 9:05 a.m.

19
20 Reported by Mary R. Sullivan, RPR, RMR, Freelance

21 Court Reporter, Notary Public, residing in Missoula,

22 Montana.

1 A P P E A R A N C E S

2 ALI BOVINGTON, ESQ.

3 Attorney General's Office

4 215 North Sanders

5 Helena, Montana 59601

6 Appearing on behalf of the Plaintiff

7 State of Montana

8

9 MICHAEL P. DOSS, ESQ.

10 Sidley Austin LLP

11 One South Dearborn

12 Chicago, IL 60603

13 Appearing on behalf of the Defendant

14 Bayer Corporation

15

16 KIM B. NEMIROW, ESQ.

17 Ropes & Gray LLP

18 One International Place

19 Boston, Massachusetts 02110-2624

20 Appearing telephonically on behalf of

21 the Defendant Warrick Pharmaceuticals

22 and Schering-Plough

A P P E A R A N C E S (CONTINUED)

JAMES J. DUFFY, ESQ.

Davis, Polk & Wardwell

450 Lexington Avenue

New York, New York 10017

Appearing telephonically on behalf of

the Defendant AstraZeneca Pharmaceuticals

KATHLEEN M. O'SULLIVAN, ESQ.

Perkins Coie LLP

1201 Third Avenue, Suite 4800

Seattle, Washington 98101

Appearing telephonically on behalf of

the Defendant Immunex Corp.

KATHERINE POLDNEFF, ESQ.

Kelley Drye & Warren LLP

101 Park Avenue

New York, New York 10178

Appearing telephonically on behalf of

the Defendant Dey Pharmaceuticals

A P P E A R A N C E S (CONTINUED)

JEREMY P. COLE, ESQ.

and GABRIEL H. SCANNAPIECO, ESQ.

Jones Day

77 West Wacker Drive

Chicago, Illinois 60601

Appearing telephonically on behalf of
the Defendants Abbott Laboratories and
TAF Pharmaceuticals.

Also Present: Ken Zoetewey, Videographer.

1 I N D E X

2 WITNESS: JEFF BUSKA PAGE

3 Examination by Mr. Doss..... 486

4

5 E X H I B I T S

6 NUMBER DESCRIPTION PAGE

7 Exhibit Buska 050 - Defendant Bayer Corporation's

8 Notice of 30(b)(6) Deposition

9 to State of Monana..... 487

10 Exhibit Buska 051 - MT 038340 to 8359..... 495

11 Exhibit Buska 052 - MT 076330 to 6361..... 506

12 Exhibit Buska 053 - MT 038297 to 8329..... 508

13 Exhibit Buska 054 - MT 038594 to 8626..... 508

14 Exhibit Buska 055 - MT 076440 to 6448..... 526

15 Exhibit Buska 056 - Objections and Responses to

16 Defendant Bayer Corporation's

17 First Set of Interrogatories. 551

18 Exhibit Buska 057 - MT 076251..... 573

19 Exhibit Buska 058 - Letter dated January 29, 2001 578

20 Exhibit Buska 059 - Email dated 2/13/2002..... 582

21 Exhibit Buska 060 - Email dated November 19, 2002 582

22 Exhibit Buska 061 - Email dated November 22, 2002 582

1 activities, prior-- third-party liability unit, as
2 well as the Medicaid Quality Control Review.

3 Q. Mr. Buska, I don't intend to go back
4 over your work history for the State of Montana,
5 but is it fair to say that you've worked within
6 the State's Medicaid program for over 15 years?

7 A. That would be correct, yeah, over 15.

8 MR. BUSKA: I'll first ask that this
9 document be marked as Exhibit Buska 050, 5-0.

10 Q. (By Mr. Doss) And I've already provided
11 a copy to your counsel.

12 EXHIBIT:

13 (Exhibit Buska 050 marked for
14 identification.)

15 Q. (By Mr. Doss) Mr. Buska, I've provided
16 to you a document marked for identification as
17 Exhibit Buska 050, and for the record, this
18 document is entitled Bayer Corporation's Notice of
19 Rule 30(b)(6) Deposition to State of Montana. Sir,
20 I'll direct your attention to the second page of
21 this document, and specifically to the paragraphs
22 that are listed under the heading Areas of

1 Inquiry. Do you see that?

2 A. Yes.

3 Q. And first, sir, I'll--I'll--I'll read

4 these to you and then I'll ask you questions

5 relating to this. First, in--directing your

6 attention to paragraph No. 1, Plaintiff--the--

7 well, let me go ahead and read the introductory

8 phrasing as well. "Plaintiff is requested to

9 designate one or more persons who consent to

10 testify on its behalf concerning the following

11 matters: 1., Plaintiff's use or consideration of

12 Bayer ASP Information, including how or if such

13 Bayer ASP Information has been used, relied upon,

14 referenced or considered in evaluating, revising,

15 or setting payments to Providers under Plaintiff's

16 Medicaid Program." Did you see that entry?

17 A. Yes.

18 Q. And are you today here to testify as the

19 Montana State representative on that topic?

20 A. Yes, I am.

21 Q. Sir, the--the second paragraph I'll read

22 as well. "Communications between Plaintiff and

1 the next page which is Page 10 and paragraph--
2 subparagraph b), so this is 8)b), and specifically
3 to the entry Average Sale Price Reporting
4 Procedure. Do you see that paragraph?

5 A. Yes.

6 Q. Rather than reading this entire
7 paragraph, if you could read it to yourself for a
8 moment, and then I'll--I'll have a couple of
9 questions relating to it.

10 A. Just b)? Yes.

11 Q. Yeah, just b). Sir, is it correct that
12 the State of Montana under the settlement
13 agreement that we're currently reviewing required
14 that Bayer provide to the State on a quarterly
15 basis average sale price information for all Bayer
16 products under a methodology that's described in
17 paragraph b)?

18 A. I would state the State did not require
19 that it be reported, but the settlement agreement
20 with the National Association of State Medicaid
21 Fraud Control Units required that it be sent to us
22 and all states.

1 Q. Well, it--perhaps under--maybe we'll--
2 don't want to fight about the language. Is it
3 correct that under the terms of the settlement
4 agreement between the State of Montana and Bayer
5 Corporation, Bayer was obliged to provide to the
6 state Medicaid program average sale price
7 information for all Bayer products sold in the
8 United States--

9 A. Yes.

10 Q. --all pharmaceutical products?

11 A. That's what this says.

12 Q. Such Bayer average sale price
13 information was provided to the State of Montana
14 on a quarterly basis from the date of this
15 agreement until the present; is that correct?

16 A. I do recall seeing some of those
17 reports, yes.

18 Q. But on--on behalf of the State of
19 Montana, are you able to testify that Bayer
20 provided to the State of Montana quarterly average
21 sale price reports for all of its Bayer products
22 from the date of this settlement agreement up to

1 Then Shannon Marr had the position for a while,
2 and then--in an acting role, then Duane
3 Preshinger, and then Dan Peterson.

4 Q. And so Dan Peterson is as of today?

5 A. No.

6 Q. Oh.

7 A. Dan Peterson supervises that unit now.
8 He's the section supervisor, and quite frankly, I
9 don't know the name of the current pharmacy
10 administrator, I don't believe I've met her.

11 Q. Why don't we go ahead and move on to the
12 other two documents I've asked that were
13 previously marked for identification, and the
14 first one, which has been presented to you, Mr.
15 Buska, is marked Exhibit Buska 053, and it bears
16 Bates label MT 038297 through MT 038329 and has a
17 cover page that's dated October 30th, 2001. The
18 second document that I've asked be presented to
19 you is marked Exhibit Buska 054. That bears Bates
20 label MT 038594 through MT 038626, and it has a
21 cover--cover letter dated July 30th, 2002. If you
22 could, sir, if you could review both of these

1 documents and identify them for us.

2 A. Yeah, the document Exhibit Buska 053 is
3 a report from Bayer to the State of Montana or
4 received by the State of Montana, it's not
5 addressed to us. It was received by the Health
6 Policy and Services Division on November 5th,
7 2001; and the Exhibit Buska 054, again, is a
8 report on the average sales price that the State
9 of Montana received and date stamped August 2nd,
10 2002 by the Health Policy and Services Division.

11 Q. I'll direct your attention to the first
12 cover page and--reflecting on our earlier
13 discussions. Do you see that one of the
14 addressees of this document is Mr. Joseph Palermo,
15 First DataBank in California. Do you see that?

16 A. Yes.

17 Q. So--and these--these documents come from
18 Montana Medicaid's files; is that correct?

19 A. Yes.

20 Q. So from these documents, it's clear that
21 First DataBank received a copy of the same average
22 sale price information that Montana Medicaid

1 received; is that correct?

2 A. It would indicate that it was sent to
3 them, yes, or it was addressed to them.

4 Q. The average sale price--I'll call these
5 average sale price reports. Is that a--

6 A. That's fine.

7 Q. --understandable for you? The average
8 sale price reports that we've just been reviewing,
9 which are Exhibit Buska 052, Exhibit Buska 053 and
10 Exhibit Buska 054, is it correct that those
11 document Bayer's average sale price for all of its
12 pharmaceutical products to the State of Montana
13 for the dates that are reflected on the documents?

14 A. I don't know if it's for all the
15 pharmaceutical products submitted by Bayer,
16 because I would imagine that Bayer probably has a
17 lot more NDCs than what's in this report, so I
18 can't confirm that it's all of them.

19 Q. Well, you're--you--you understand that
20 under the settlement agreement between the State
21 of Montana and Bayer, Bayer's required to provide
22 to the State of Montana average sale price

1 information for all of the Bayer pharmaceutical
2 products that are reimbursed by the State.

3 A. Drugs and biologicals, yes, but--so
4 perhaps it is all of them, yes.

5 Q. Well, do you have any reason to
6 challenge that it's all of them?

7 A. No, I don't, but I don't know if it's
8 all of them.

9 Q. Well, you're the State of Montana
10 testifying today.

11 A. Yes.

12 Q. Have you ever made any complaint to
13 Bayer that the--

14 A. No, I haven't.

15 Q. --reports do not include all the Bayer--

16 A. No.

17 Q. --pharmaceutical products?

18 A. No.

19 Q. So you have no reason to doubt that
20 these are not all of the--

21 A. No--

22 Q. --pharmaceutical--

1 individuals would receive the reports to them
2 personally; is that right?

3 A. Yes.

4 Q. They would review these Bayer average
5 sale price reports?

6 A. They would look at it, yes.

7 Q. What happened after it was received by
8 the Medicaid program director--what's the proper
9 title?

10 A. Program officer.

11 Q. Program officer.

12 A. They were put in a file.

13 Q. Do you know whether they were
14 distributed within any other Montana Medicaid
15 representatives?

16 A. No, I believe they were not.

17 Q. And whose files were they put in?

18 A. The Medicaid pharmacy program officer.

19 Q. Is that where the exhibits that we've
20 just been reviewing, the Exhibit Buska 052,
21 Exhibit Buska 053 and Exhibit Buska 054, those
22 documents came out of the Medicaid pharmacy

1 program officer's files?

2 A. Yes.

3 Q. Were they in anybody else--were copies
4 of these reports found in anyone else's files, to
5 your knowledge?

6 A. To my knowledge, no.

7 Q. I'll--I'll direct your attention to two
8 of the materials. This cover page appears very
9 similar, Exhibit Buska 053 and Exhibit Buska 054,
10 and I'll just read into the record the paragraph
11 1. Each of these letters has the same entry cover
12 letters. "Report of Average Sale Price for the
13 third quarter of 2001 (Section III(D)(2)(b)).
14 This information is also included on the enclosed
15 diskette." Do you see that?

16 A. Yes.

17 Q. Were diskettes of the Bayer average sale
18 price information received by the State of
19 Montana?

20 A. I would imagine that it probably did
21 come with these--these letters, yes.

22 Q. Were the--and by diskette, does that

1 EXHIBIT:

2 (Exhibit Buska 055 marked for
3 identification.)

4 Q. (By Mr. Doss) Mr. Buska, if you could
5 take a moment and review what's been marked for
6 identification as Exhibit Buska 055, and for the
7 record, while you're doing that, Exhibit Buska 055
8 is marked with Bates labeling MT 076440 through MT
9 076448. The first two pages appear to be a Bayer
10 average sale price report with some handwritten
11 entries, and then the last five pages appear to
12 include a cover letter dated August 30th, 2001
13 reflecting the enclosure of Bayer Corporation's
14 average sale price report. My question, sir, will
15 be focusing on the first few pages, but if you
16 could review this document and identify it for us,
17 please.

18 A. This document is a report on the average
19 selling price Bayer Pharmaceuticals quarter
20 2001/02 quarterly report. It has listing of the
21 number of NDCs, product code, product name, the
22 average sales price with some handwritten notes of

1 AWP, and then later on, then it has the cover
2 letters from previous documents that we've
3 reviewed dated August 30th, 2001 received by the
4 State of Montana Health Policy and Services
5 Division September 14th, 2001.

6 Q. Did Exhibit Buska 055, did that come out
7 of Montana Medicaid files?

8 A. Yes.

9 Q. And specifically, did Exhibit Buska 055
10 come from the Medicaid pharmacy program officer
11 files that you were referencing earlier?

12 A. Yes.

13 Q. The average sale price reports that
14 Montana received from Bayer did not include
15 handwriting in the average sale price report
16 itself; is that right?

17 A. That's correct.

18 Q. Are you able to tell us how the
19 handwriting that appears on Exhibit Buska 055 came
20 to appear on that document?

21 A. It would have been handwritten--it is
22 the handwriting of Shannon Marr who was the

1 pharmacy program officer at that time.

2 Q. And so that the record is clear, what
3 I'm referencing in terms of handwriting initially
4 is--do you see in the very first page, which is
5 Montana 076440, I'm looking at a column that is--
6 has handwriting AWP. Do you see that?

7 A. Yes.

8 Q. And then under that column, there's a
9 series of entries in--in--in handwriting. Do you
10 see those?

11 A. Yes, to the left of the Average Sales
12 Price.

13 Q. Yes.

14 A. Yes.

15 Q. So--and to the left of the typed-in
16 average sale price information.

17 A. Yes.

18 Q. And so you're able to today testify for
19 Montana that--whose--whose handwriting is--is
20 this?

21 A. This is Shannon Marr's handwriting.

22 Q. And remind me who Shannon Marr was--

1 A. Shannon Marr was the pharmacy program
2 officer at the time.

3 Q. What are the handwritten entries?

4 A. The handwritten entries, I would imagine
5 what she did is she went into our claims payment
6 system and looked up the NDC for every one of
7 these--these drugs and indicated the--what the
8 average wholesale price was probably for the
9 current time period, and when she did this, it's
10 not dated as to when she did this, these hand--
11 these entries on here, but would have been the
12 average sales price--or average wholesale price at
13 that time that was in our reimbursement system.

14 Q. Well, let's just take a for example.
15 The--the last entry on the first page, do you see
16 that? It's the product name is Ciprofloxacin HCL
17 750 milligrams, 100s, UD?

18 A. Yes.

19 Q. And that--that has under the AWP column-
20 -the entry is 4.82740; is that right?

21 A. That's correct.

22 Q. And then the typed-in average sale price

1 for that same product is 3.42934; is that right?

2 A. No.

3 Q. Oh, did I say--

4 A. 3.429394.

5 Q. Thank you for the correction. Then--

6 now, the average sale price information comes from

7 Bayer Corporation; is that right?

8 A. That's correct.

9 Q. The AWP information that appears comes
10 from what source?

11 A. Comes from a hand entry by the pharmacy
12 program manager by looking up the reimbursement
13 rates, the AWP prices that we have in our claims
14 processing system.

15 Q. And that AWP information is available by
16 any one of the Medicaid--Montana Medicaid
17 representatives?

18 A. Yes.

19 Q. They can access that?

20 A. Yes. Individuals that have security
21 clearance to access the claims file--the claims
22 payment system can look this up.

1 Q. When were these hand--handwritten
2 entries reflected in Exhibit Buska 055 made?

3 A. The document doesn't indicate a date,
4 but it would have been sometime after September
5 14th, 2001.

6 Q. During what period--you mentioned that
7 the handwriting is Shannon Marr's; is that right?

8 A. That's correct.

9 Q. And during what period was Shannon Marr
10 in a position at Montana Medicaid to have been
11 able to make those entries?

12 A. Would have been during her employment
13 with the State of Montana, which was a very short
14 period of time. I do not recall the dates of
15 this, but I believe she was hired sometime around
16 the summer, spring, summer of 2001, and I think
17 the following summer she left.

18 Q. The document we--we've been reviewing,
19 Exhibit Buska 055, was this document found in the
20 same place as the other Bayer average sale price
21 reports were found?

22 A. I believe so, in the pharmacy program

1 officer's files.

2 Q. Well, is it fair to say that this
3 document reflects Montana Medicaid's comparison of
4 Bayer's reported average sale price information to
5 the AWP information that the Medicaid department
6 has access to for each of the reference products?

7 A. Yeah, it would be a comparison.

8 Q. Were other similar comparisons made for
9 other time periods and other Bayer average sale
10 price reports?

11 A. Not to my knowledge.

12 Q. Were there any discussions within
13 Montana Medicaid concerning Exhibit Buska 055? In
14 other words, concerning the comparison of the
15 Bayer average sale price information to the AWP
16 information for the same product?

17 A. Could you clarify your question? Is
18 that there was a discussion?

19 Q. Any internal discussion within Montana
20 Medicaid concerning the comparison of the AWP
21 information and the Bayer average sale price
22 information.

1 testimony because we pay according to our state
2 plan.

3 Q. One point I'll push on. You've
4 previously testified that the Montana pharmacy
5 program director compared Bayer ASP information to
6 the corresponding AWP information for the
7 particular Bayer product; is that right?

8 A. Yes, there's that document that
9 indicates that.

10 Q. So is it fair to say that Montana
11 Medicaid considered the Bayer average sale price
12 information in evaluating its payment methodology
13 that was in existence at the time?

14 A. No, I wouldn't say that--that document
15 would indicate that.

16 Q. Well, what does that document indicate
17 to you?

18 A. That document that we previously
19 referred to would indicate somebody did a
20 comparison of the AWP price to the average sales
21 price, not what we would pay for that particular
22 drug to the average sales price, because the